

Claimant argues the ALJ's Order for Penalties should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The facts are essentially undisputed. The ALJ's Award in this claim was entered on July 29, 2010. Upon review, the Board, in an Order dated February 4, 2011, affirmed the ALJ's Award. Respondent then appealed the Board's Order to the Court of Appeals. The Court of Appeals affirmed the Board's Order in a decision dated October 28, 2011.

The underlying ALJ's award provided in pertinent part:

The claimant is entitled to 16.94 weeks of temporary total disability compensation at the rate of \$510 per week or \$8,639.40 and 41.31 weeks of permanent partial disability compensation at the rate of \$510 per week or \$21,068.10 for a total award of \$29,707.50, all of which is due and owing and ordered paid in one lump sum, minus amounts previously paid.¹

The ALJ's Award contained the stipulation that respondent had paid temporary total disability compensation for 16.94 weeks at the rate of \$510 per week in the amount of \$8,639.21.

After the decision by the Court of Appeals, the respondent sent a check to claimant's attorney in the amount of \$19,903.63 and by e-mail, respondent's attorney noted respondent's payment records for claimant indicated claimant had been paid more temporary total disability compensation and temporary partial disability compensation than the \$8,639.21 that had been stipulated to in the Award.

The respondent provided a printout which indicated claimant had received payments for disability compensation benefits totaling \$9,803.87 before the Award was entered. After the appeals were completed and the Award became final another \$19,903.63 was paid by respondent to claimant which together total \$29,707.50, the total amount of claimant's Award.

The claimant's attorney in a letter dated November 29, 2011, made a 20-day demand upon respondent's counsel which provided in pertinent part:

According to the stipulations, Patricia Dawson was paid \$8,639.21 in temporary total disability benefits. In addition, I received - from the State - check

¹ ALJ Award (Jul. 29, 2010) at 4.

number 2001005142 in the amount of \$19,903.63. Subtracting these amounts from the total Award of \$29,707.50 leaves a total due and owing of \$1,164.66.

Claimant's attorney then filed an application for penalties. A penalty hearing was held on February 7, 2012. The claimant alleged an underpayment of permanent partial disability. Stacy Bigaouette, respondent's claim adjustor, became claimant's adjustor on October 28, 2011. Ms. Bigaouette testified that the checks identified on respondent's exhibit A were received and cashed by claimant before the regular hearing. Those checks were identified as being for either temporary total disability, temporary partial disability or permanent total disability. None were designated as permanent partial disability. The total amount was \$9,803.87. Claimant does not dispute that she received that amount of money.

The Administrative Law Judge (ALJ) found:

The award was sent to the parties on July 29, 2010, some 80 weeks ago, reviewed and subsequently affirmed by the Workers Compensation Board and affirmed and by the Court of Appeals. The parties have had ample time and the authority to modify the award through written agreement (K.S.A. 44-526) or the Court may have the authority to review and modify the award under the auspices of K.S.A. 44-528. To the Court's knowledge, none of these proceedings have been undertaken by the respondent.²

The ALJ ordered respondent to pay \$2,000 (80 weeks times \$25) in penalties and continuing at \$25 per week until the remaining permanent partial disability payment in the amount of \$1,164.47 has been paid to claimant.

Respondent argues the compensation awarded is res judicata and claimant has received the total amount of compensation awarded. Because the total was paid within 20 days of the demand, there is no basis to award penalties. The Board agrees.

The parties' stipulated that claimant received \$8,639.21 in temporary total disability compensation. It is further undisputed that claimant received that amount of money and was additionally provided more disability compensation, part of which was mistakenly labeled for permanent total disability. The significant undisputed fact is that the underlying Award was for a total amount of \$29,707.50 which the claimant has received. The claimant's argument makes no mention of that fact nor does claimant dispute the fact that she has received that amount from respondent. Moreover, it is significant to note that claimant's argument disregards the portion of the underlying award that provides claimant was entitled to a total award of \$29,707.50 "all of which is due and owing and ordered paid in one lump sum, *minus amounts previously paid.*" (Emphasis Added.) That language means just what it says and it does not matter whether the check was denominated as

² ALJ Order (Feb. 14, 2012).

being for temporary total disability, temporary partial disability, permanent partial disability or permanent total disability. Once the Award became final it is res judicata and binding on both parties.

In summary, the Award was for a total of \$29,707.50 and there is no dispute that claimant received that total amount of compensation from respondent before the 20-day demand period expired. Accordingly, there is no basis for imposing penalties and the ALJ's Order For Penalties is reversed.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.³ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Order For Penalties of Administrative Law Judge Brad E. Avery dated February 14, 2012, is reversed.

IT IS SO ORDERED.

Dated this 27th day of April, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant, janfisher@mcwala.com
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Brad E. Avery, Administrative Law Judge

³ K.S.A. 2010 Supp. 44-555c(k).